IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Arbitration Petition (Ld) No. 528 of 2007

Fractal Analytics Ltd.)
a company incorporated)
and registered under the)
provisions of the)
Companies Act,1956,having)
its registered office at)
602A, 6th floor,Olympia)
Hiranandani Business)
Park, Powai, Mumbai)
400 076 and its Corporate)
Office at Corporate)
Enclave Level 4 and 5)
B.D.Sawant Marg, Mumbai) ..Petitioner

vs.

1. Ramkrishna Reddy)
Desari of Mumbai,)
Indian Inhabitant,)
residing at Flat No.)
2603, Wing A, 26th)
floor, Avalon CHS Ltd)
Hiranandani Gardens,)
Powai, Mumbai 400 076)

2. Pradeep Suryanarayan)
of Mumbai, Indian)
Inhabitant, presently)
residing at 2, River)
Valley Close #05-02)
the Regalia,Singapore)
238428) ..Respondents

Mr.R.A.Dada, Sr.Counsel with Mr.F.Dubhash i/b M/s Federal and Rashmikant for petitioners.

Mr.Virag Tulzapurkar, Sr.Counsel with Ms.Sammya Srikrishna and Ms.Ritambhare Bahati i/b Wadia Ghandhy and Co. for respondents.

Judgment Reserved on: 29.10.2007
Judgment delivered on 20.11.2007

CORAM: S.C.DHARMADHIKARI J.
20th November, 2007

J U D G M E N T:

1. This is a petition under section 9 of the Arbitration and Conciliation Act, 1996. The petitioners claim restraint order against the respondents in terms of prayer clauses (A) to (C) of the petition, however, the arguments were advanced principally with regard to prayer (C) of the petition which reads as under:

> "(C) This Hon'ble Court be pleased to restrain the respondents from soliciting/poaching the employees of the Petitioner company and their existing client/clients with whom petitioner company have already initiated projects on pilot basis by using the confidential information, trade secrets, etc. of the petitioner company which they were privy to in their capacity as Directors/key Employees of the petitioner company."

2. Mr.Dada, learned Senior Counsel appearing for the petitioner submits that the petitioner was

incorporated by 5 persons who were undergoing studies at the Indian Institute of Management (Ahmedabad). These persons are initial subscribers of the petitioner. He has invited my attention to the process by which the name of the petitioner has undergone a change. Presently the petitioner is known by the name set out in cause title of this petition.

3. It is contended before me that the petitioner enjoys high reputation and standing in the field of business consultantcy, domestically as well as internationally. The clientel of the petitioner included some leading private sector Banks. With a view to expand the infrastructure and capitalize on the market share, on 21st January, 2004 the petitioner and its five founder members/promoters entered into the shareholders Agreement with one Gulu Mirchandani and Geeta Mirchandani, pursuant to which they made investments in the petitioner company. Mirchandanis were allotted equity shares of the petitioner company. The amount which was invested by these persons was to be utilized for expanding the base of the petitioner company. The parties to the arrangement agreed upon their respective rights and liabilities in relation to

day to day management of the company. In the mean while, the petitioner made its Singapore and USA subsidiaries operational. It was contended that in May, 2005, Mr.V.Shrikanth was appointed as Chief Executive Officer unanimously. However, in later half of 2007 differences arose between the promoters. The promoters continued on the Board of the petitioner company. There were several suggestions during the discussion. The Board meeting of the petitioner was held on 16th February, 2007. The investors exercised their right under the shareholders agreement and nominated four directors. Mr.Gulu Mirchandani unanimously came to be appointed as Chairman. Another Board meeting was held on 29th March, 2007. However, in May, 2007, the Chief Executive Officer made a detailed report with regard to the differences between the petitioner and respondents. This report was submitted to the Board.

4. It is alleged that on 22nd May, 2007, the respondents addressed e-mail to the three founder members/promoters and employees of the petitioner making false and baseless allegations. They incited the employees and urged them not to report to the Board. This e-mail was replied by the Chief

Executive Officer of the petitioner. They were informed that each of them is acting contrary to the interest of the company. However, a suggestion was given with regard to a meeting to personally sort out the differences.

5. It is urged that in June/July 2007, the respondents along with certain employees of the petitioner associated themselves with the competitor of the petitioner, namely, Adventity B.P.O. (India) Pvt. Ltd. This compelled the petitioner to convey the board meeting on short notice. On 25th June, 2007, a Board meeting was convened and a Resolution was passed to suspend the services of the respondents with immediate effect. However, prior thereto the respondents dispatched their resignations. Another board meeting was convened to discuss these resignations and even the respondents were invited to the same. However, for this Board meeting of 29th June, 2007, the respondents did not turn up. Thereupon, a resolution was passed by the Board not to accept the resignations which were sent on the previous day but to initiate legal proceedings against the respondents. This was duly intimated to the respondents but by their e-mail of 3rd July, 2007,

the respondents reiterated that they had resigned with effect from 28th June, 2007. The respondents clarified that after the said date they remained as only shareholders of the petitioner company. Correspondence thereafter followed between the Advocate leading to the filing of this petition.

6. Mr.Dada, learned Senior Counsel appearing in support of this petition, submits that the shareholders agreement, a copy of which is annexed to the petition as Annexure A, clearly states that the respondents are parties to the same. The respondents are governed by this agreement. After inviting my attention to various definitions and recitals, Mr.Dada submits that clause 2.1.3 of this agreement makes it clear that all the key employees of the petitioner have agreed to be employed, with the conditions laid down in the agreement, including that of confidentiality and non competition. He submits that the key employees agreed for the life time confidentiality. They also agreed not to join or start a competing business till the period set out in Schedule 4 to the Agreement. He submits that the consequences are also prescribed in the agreement.

7. Mr.Dada lays special emphasis on clause 6 of the agreement which states that each of the promoters undertook to remain employed with the petitioner and so long as a promoter held any executive position in the petitioner he has further agreed to abide by clause 6.4. Mr.Dada submits that once these clauses read with Schedule 4 have been agreed to and the execution of the agreement also not being denied so also there being a dispute resolution mechanism provided under the agreement itself, then, a case is made out for interim measures. Mr.Dada relies upon the correspondence between the parties and the Board Resolutions. He submits that from the correspondence, copies of which are annexed to the petition, it is apparent that the respondents have been approaching the clients of the petitioner and soliciting business from them. These clients in turn have been corresponding with the petitioner pointing out to them that they have been approached by the respondents. In such circumstances all that is necessary to be provided at this stage is protection against the respondents' soliciting business from the existing clients of the petitioner. In this behalf he has invited my attention to the Board Resolution and the

correspondence between the Advocates as well.

8. Mr.Dada has also handed with a compilation of documents which, according to him, would demonstrate the clients of the petition who have been approached by the respondents and at the instance of the respondents, the clients have started doing business with M/s Adventity. M .Dada has also placed reliance upon a decision of the learned Single Judge of the Hon'ble Delhi High Court rendered on 8th May, 2006 and reported in 130(2006) Delhi Law Times page 330 (Mr.Diljeet Titus, Advocate Vs.Mr.Alfred A.Adebare and others). He submits that this was a case of lawyer's firm. The Hon'ble Delhi High Court has restrained the defendants before it from in any manner utilizing the material of the plaintiff before it and from disseminating or otherwise exploiting the same including the data for their own benefit. He has relied upon paras 75, 85 and 86 of the said decision.

9. Mr.Dada submits that a prima facie case is thus made out and until the Arbitral Tribunal decides the matter finally, this Court should pass appropriate interim measures so that interest of

the petitioner is sufficiently protected. Mr.Dada was at pains to point out that he is not insisting upon any restraint against the respondents from pursuing their right of livelihood guaranteed to them but at the same time they must not solicit or approach the existing clients of the petitioner or take away them in any manner from the petitioner. He submits that grave and irreparable harm and injury will be caused which later on cannot be compensated in terms of money. For all these reasons, the interim order be passed as prayed.

10. On the other hand Mr.Tulzapurkar, learned Senior Counsel appearing for the respondents, vehemently submits that the petition itself is not maintainable. He submits that the petition proceeds on the basis that there is arbitration agreement, however, there is no arbitration agreement. The clause which was emphasized by Mr.Dada, does not apply to the relationship between the petitioner and the respondents. He submits that pre-requisites for the application under sec.9 of the Arbitration and Conciliation Act are that there must be a valid arbitration Agreement. Unless there is a valid arbitration agreement, the petition itself is not maintainable.

Alternatively, it is submitted by Mr.Tulzapurkar that assuming without admitting that the shareholders agreement, copy of which is relied upon, is consisting of arbitration agreement, yet, the said agreement read as a whole, would indicate that the same does not apply to the respondents any more. He submits that the arbitration agreement which is relied upon so also the confidentiality clause would apply within the limits specified therein. The moment the period prescribed expires there is nothing in the agreement which would bind the respondents. Without prejudice to the above, he further submits that the purported provisions of the shareholders agreement which are sought to be enforced against the respondents are null, void and not binding as they are unreasonable and in restraint of a trade. Mr.Tulzapurkar submits that the present petition has been filed at the instance of Mr.Mirchandani and other founder members. However, the agreement, the copy of which is annexed cannot be invoked in as much as the resignations have been tendered by the respondents on account of the treatment that is meted out to them. Mr.Tulzapurkar invited my attention to the correspondence and contended that the resignations have been forced upon the respondents by the

petitioner. The respondents are compelled to tender their resignations due to their ouster and with a view to preserve their self respect. He submits that the petitioners have not approached the court with clean hands. They have suppressed vital material from this Court. The entire correspondence is not annexed. Further, it is suppressed from this Court that several other employees of the petitioners have left their services. Each one of them have resigned and in sofar as these employees are concerned, no grievances are forthcoming. He invites my attention to the affidavit in reply and annexures thereto and more particularly Exhibit D to V to the same.

11. In the submission of Mr.Tulzapurkar for the reasons aforestated, this petition, deserves to be dismissed. Mr.Tulzapurkar has relied upon the following Judgments:

1. Zaheer Khan Vs.Percept D’Mark (India) Private Limited and another (AIR 2004 Bombay 362).

2. M/s Sanmar Speciality Chemicals Ltd. Vs.Dr.Biswajit Roy (AIR 2007 Madras 237).

3. M/s Gujarat Bottlsing Co.Ltd. and others Vs. Coca Cola Company and others (AIR 1995 S.C.2372)

12. In rejoinder, Mr.Dada has invited my attention to several paragraphs of the affidavit in rejoinder and sur rejoinder. He submits that there is enough material on record to hold that the respondents have breached and violated the share holders agreement. It is false to allege that the respondents have been advising M/s Adventity as consultants. He submits that no employer would ever undertake to provide residential accommodation to a consultant. Thus, false and misleading statements are made and in effect the respondents are the employees of the competitor of the petitioner. He submits that the respondents have clearly been approaching the petitioners' clients and soliciting business from them. He has also invited my attention to statements in paragraphs 48 and 49 of the rejoinder affidavit. In huis submission, the interim measures need to be provided so that the Arbitral Reference is not rendered futile and meaningless.

13. With the able assistance of Mr.Dada and

Mr.Tulzapurkar I have perused the petition and annexures thereto so also the affidavit in reply, rejoinder and sur-rejoinder. I have perused the agreement, copy of which is annexed as Annexure A. Before proceeding further, it would be appropriate to refer to the settled principles which are to be applied in considering the request as made. In a latest decision reported in A.I.R.2007 Supreme Court 2563, (Adhunik Steels Ltd. Vs.Orissal Manganese and Minerals Pvt.Ltd.)the Hon'ble Supreme Court has observed thus:

> "10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the Court to be just and convenient. The grant of an interim prohibitory injunction or an interim prohibitory injunction or interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section

9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in, the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the Section, "and the Court shall have the same power for makaing orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim

measures under section 9 of the Act.

11. The power and jurisdiction of courts in arbitral matters has been the subject of much discussion. The relationshuip between courts and arbitral tribunals have been said to swing between forced cohabitation and true partnership. The process of arbitration is dependent on the underlying support of the courts who alone have the power to rescue the system when one party seeks to sabotage it. The position was stated by Lord Mustil in Coppee Levalin NV v.Ken-Ren Fertilisersl and Chemicals (1994(2) Lloyd’s Report 109 at 116):

> "there is plainly a tension here. On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of the mechanisums of State through the medium of a municipal Court and on the other side there is a plain fact, palatable or not, that it is only a

> Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering."

In Conservatory and Provisional measures in International Arbitration, 9th Joint Colloquium, Lord Mustill in "Comments and Conclusions" described the relationship further:

"Ideally, the handing of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer any function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award".

It is in the above background that one has to consider the power of the Court approached under the Arbitration Act for interim relief or interim protection."

13. Injunction is a form of specific relief. It is an order of a court requiring a party either to do a specific act or acts or to refrain from doing a specific act or acts either for a limited period or without limit of time. In relation to a breach of contract, the proper remedy against a defendant who acts in breach of his obligations under a contract, is either damages or specific relief. The two principal varieties of specific relief are, decree of specific performance and the injunction (See David Bean on injunctions). The Specific Relief Act, 1963 was intended to be "An Act to define and amend the law relating to certain kinds of specific reliefs." Specific Relief is relief in specie. It is a remedy which aims at the exact fulfilment of an obligation. According to Dr.Banerjee in his Tagor Law Lectures on Specific Relief, the remedy for

the non performance of a duty are (1) compensatory, (2) specific. In the former, the court awards damages for breach of the obligation.d In the latter, it directs the party in default to do or forbear from doing the very thing, which he is bound to do or forbear from doing. The law of specific relief is said to be, in its essence, a part of the law of procedure, for, specific relief is a form of judicial redress. Thus, the Specific Relief Act, 1963 purports to define and amend the law relating to certain kinds of specific reliefs obtainable in civil courts. It does not deal with the remedies connected with compensatory reliefs except as incidental and to a limited extent. The right to relief of injunctions is contained in part III of the Specific Relief Act. Section 36 provides that preventive relief may be granted at the discretion of the court by injunction temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded

> either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly clause (e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963."

In para 14 of this decision, the Hon'ble Supreme Court observed that the substantive law relating to interim relief cannot be kept out of consideration while deciding the application of the present nature. It is pointed out that power under sec.9 of the Act is not to be exercised by keeping out well known principles governing grant of interim injunction. Thus, the tests that are to be applied while considering the application for interim injunction by a Court together with the provision of substantive law would govern the decision on

such an application.

14. To my mind, therefore, section 27 of the Indian Contract Act cannot be kept out of consideration. That section fell for consideration of a Division Bench of this Court in the case of Zaheer Khan Vs.Percept D'Mark (India) Private Limited and another reported in A.I.R.2004 Bombay page 362. The Division Bench referred to all the decisions in the field and ultimately held thus:

> "The legal position that appears to be fairly crystalised in India is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable unless it falls within the Exception appended to Section 27. The resonableness of the restraint is not envisaged by Section 27. Under Section 27 of the Contract Act restrictive covenant extending beyond the terms of the contract is void and not enforceable. That the doctrine of restraint of trade does not apply during the continuance of

> the contract of employment and it applies only when the contract comes to an end, is not confined to a contract for employment, but is also applicable to other contracts. In other words, the doctrine of restraint of trade is the same for the contracts for employment as well as the other contracts and the restrictive covenant in the agreement to operate beyond the contract period is void and hit by section 27 of the Contract Act. Restrictive covenant is to apply during the period of contract but shall fall under section 27 of the Contract Act where it is to operate after the contract has ended."

15. Thus, while considering the request of Mr.Dada for grant of temporary injunction in terms of prayer clause (C), it would not be permissible to ignore the mandate of section 27 of the Indian Contract Act, 1872. It is not proper to compartmentalize or restrict the request as urged by Mr.Dada. Even if the petitioner prays that the respondents be restrained from soliciting/poaching the Employees and their existing clients and

solicit business from them, still, this request will have to be considered by applying the well settled principles referred to above. One would have to take into account the nature of restriction and period for which the same is to remain in force. A prima facie case will have to be made out and which case has to be considered in the backdrop of section 27 of the Contract Act. So called negative covenant and its validity would have to be prima facie tested on the touch stone of these principles.

16. By applying the same to the facts and circumstances of the present case, it is apparent to me that Schedule 4 of the agreement which is annexed to Annexure A provides that the key employees of the petitioner would not indulge in competing activities for a period of 6 months from the termination of their employment agreement. Thus, the period covered is post termination of the contract of Employmenmt without entering into the larger controversy about the mode of termination of the Employement of the respondents, it is apparent that the restriction under this Schedule operates after the contract comes to an end.

17. Apart from the fact that there is a serious dispute as to whether the rights of the petitioners and respondents as Master and Servants are governed by the shareholders agreement, yet, it is apparent from a reading thereof that the same is between the petitioners and first time investors namely, Mirchandanis, so also the respondents in their capacity as promoters and shareholders. While setting out their respective rights and liabilities it is clear that the promoters have agreed to remain employed with the petitioners till 1st March, 2004. The key employees of the petitioner have agreed to be employed on the terms and conditions prescribed in clause 2.1.3. However, the employment agreement is provided in clause 6 which reads thus:

> 6. Employment Agreement:
>
> 6.1. Each of the Promoters hereby undertakes to remain employed with the FTL till March 1, 2004.
>
> 6.2. If any Promoter Voluntarily ceases to be an employee of the FTL before the expiry of the terms referred to in Clause

6.1, the Promoter concerned shall be liable to forfeit any Shares held by him in the FTL on the following basis:

Period when Employment Agreement is terminated	Percentage of holding liable for foreiture
Prior to March 1,2004	12.5%
After March 1, 2004	0%

In case of death or permanent disability of a Promoter the above forfeiture will not apply. In case a Promoter is asked to leave by the Board,the forfeiture will be decided by the Board which in any case cannot be worsen than what is given in the above schedule.

6.3 Any share forfeited may be purchased by the FTL to the extent permissible by law and then the remaining shareholders of the FTL in proportion to their shareholding on the date of forfeiture.

6.4 So long as a Promoter holds any executive position in the FTL, such promoter shall not:

a) Invest in any business or businesses competing with the business of the FTL; or

b) Hold any executive position in any business or businesses competing with the Business of the FTL PROVIDED that where any Promoter ceases to hold an executive position in the FTL, he shall be entitled to hold an executive position in any business or businesses competing with that of the FTL at any time after the expiry of the stipulated time as given in Schedule 4.

c) Disclose any information or knowledge pertaining to the business of FTL, in any manner adverse to the best commercial interest of FTL.

d) Seek to recruit any employees/executives of FTL or canvas any

of the existing clients or customers of FTL."

18. A bare perusal of clause 6 and more particularly clause 6.4 would make it apparent that so long a promoter holds an executive position, he shall not indulge in the acts specified in sub-clauses (a) to (d). It would also be proper to note that clause 18 of the agreement speaks of confidentiality. Now, clause 18.2 provides that save and except with prior written consent of each of the other parties to the agreement shall keep confidential the information which it may obtain from any other party pursuant the shareholders agreement. It is apparent to me that clause 6.4 and more particularly sub clause (d) which is sought to be pressed cannot be stretched to such an extent so as to make it impossible for either the respondents to contact the existing clients or customers of the petitioner indefinitely when the prohibition is to operate during the continuation of employment, then, providing for a restriction after the contract is terminated would be prima facie covered by Section 27 of the Contract Act and the principles referred to above. The petitioner cannot prima facie restrain a third party from

recruiting any employee/executive of the petitioner indefinitely or such employee associating with it. Assuming that the clause is restricted to the promoters, yet, the promoter cannot be restrained indefinitely from recruiting any employee/executive of the petitioner or canvas any of the existing client or customer of the petitioner indefinitely. If the restraint that is prayed for before me by Mr.Dada is with regard to soliciting the business of the petitioner or taking away their existing clients or customers, still, that restraint on the respondents cannot be for indefinite period. Such a restraint being undisputedly in trade would definitely be covered by section 27 of the Indian Contract Act. Prima facie, the party to the agreement for indefinite and undefined period restrained during the course of his business activities from establishing any contacts with the customers or clients of the petitioners so also recruiting any employee/executive of the petitioners. Such a restraint would be clearly unreasonable, unconscionable and contrary to public policy. That apart, there is serious dispute as to whether the respondents have been employed by any competitor of the petitioner. The respondents urge that they are rendering consultancy services only.

Further no material is provided to show that the respondents have commenced and set up competing business of their own. No details are provided apart from some letters from the clients of the petitioner.

19. There is much substance in the contention of Mr.Tulzapurkar that if the period which is prescribed by Schedule 4 is to be read as being restricted to holding of any executive position in any business or businesses competing with that of the petitioner and that period being stipulated by schedule 4, then, not reading any such restriction qua clauses 6.4(c) and (d) would defeat the mandate of section 27 and even otherwise would be contrary to public policy.

20. That apart, in the affidavit in reply, there is a specific case set up by the respondents that the clauses are contrary to public policy being in restraint of trade. There is a specific plea raised by respondents that they were forced to resign by the petitioner, then, by their own conduct the petitioner has disentitled itself from any equitable and discretionary relief. In this behalf, it has been specifically urged in para 7(d)

of the affidavit in reply that respondents have invested all their efforts into building of the petitioner. The petitioner company was given best of their attention and they worked with complete devotion. They have contributed over 60% of the total business of the petitioner. They have all through out been working in the interest of the petitioner but two co-founders (Mr.Nirmal Palaparthi and Mr.Pranay Agarwal) were working against the interest of the petitioner. Mr.Palaparthi incorporated a company in Singapore in the name of "Kalpavriksham Pte.Ltd.". It is competing with the petitioner. Mr.Pranay Agarwal also incorporated a company in U.S.A. in the name of "Fractal ROI Corporation". It is in such circumstances and when Mr.V.Shrikanth was appointed as a Chief Executive Officer that the disputes and differences cropped up between the petitioner and the respondents. In fact, it was agreed at one stage that Mr.Palaparthi and Mr.Agarwal would resign. In this behalf, a reference is made to e-mail dated 30th November, 2006. Thereafter, decisions which are taken by Mr.V.Shrikanth have been referred to extensively in the affidavit in reply which led to a series of letters being exchanged between Mr.Shrikantha and the

respondents. The respondents felt humiliated and insulted by the attitude of Chief Executive who constantly spoke of firing them. Even Mr.Gulu Mirchandani was threatening the respondents.

21. A detailed reference is made in para 7(i) of the reply to the board meeting. It is in such circumstances and when the respondents have resigned from the services that it is urged that these clauses would not apply. In para 7(m) of the reply, this is what is stated by the respondents.

> "7(m) I say that the case of the petitioner company as set out in the petition is bad on the face of it and the petitioner is not entitled to any of the relief sought. The respondents are no longer in the employment leave alone in "executive positions" of the Company and as such the provisions of Clause 6.4 of the Shareholders Agreement which are sought to be relied upon by the petitioner company would not and do not apply. In any event and without prejudice to the foregoing, I say that the respondents are not employed l;with nor hold any "executive position" with Adventity BPO India Private

Limited (hereinafter referred to as "Adventity") as is falsely alleged by the petitioner company and are not in the possession of any confidential information of the petitioner Company as falsely made out by the petitioner Company. I say that the only property of the petitioner company which is the possession of the respondents are 2 laptops (one held by each of the respondents) that have been used by the respondents over the last two years for presentations to clients and contain the correspondence exchanged between the petitioner company, other co-founders, First Round Investors and the Respondents which information as above, in any event, is not confidential. Further, the laptops do not contain any confidential information, whatsoever, of the petitioner Company. In fact, all confidential information including the properties described the petitioner Company in Exhibit S to the petition are lying with the petitioner company in the premises of the petitioner Company to which the respondents have no access and copies, to the knowledge of the petitioner Company.

I say that the respondents are ready and willing to hand over to the petitioner company the laptops simultaneously upon the petitioner company paying to the respondents the various amounts owned by the petitioner company to the respondents and discharging their statutory obligations towards the Government of India and the Government of Singapore by filing Form 16 and Form IR8A under the Income Tax Act, 1961 in respect of the respondents. Annexed hereto and marked as Exhibit AE are the details of the amounts due and payable by the petitioner company to the respondents. I submit that the respondents are entitled to a lien on the laptops for the payments due and outstanding and as they have been ousted from the petitioner company, they are also entitled to appropriate protection by statutory filings in India and Singapore. The respondents are also entitled to retain copies of such correspondence addressed to/by them which are required by them in connection with the present dispute. Some of such correspondence has already been annexed to this petition and others may be

> referred to and relied upon by the respondents. In any event, such correspondence cannot be considered as confidential.
>
> 14. I deny that the respondents are in possession of the property of the petitioner Company which includes source codes along with the alleged sensitive technical data, research, sales presentations, client list and contact details, employee data base, drawings, products plans, products, services, markets, software and other business related information relating or belonging to the petitioner company, as alleged or at all. I say that all of the information is contained on the servers of the petitioner company and is not accessible to or in the possession of the respondents"

It is rather surprising that the petition does not disclose the correspondence, copies of which are annexed to the reply, so also the specific averments therein. All that is urged is that the respondents have not been working as consultants but employed by M/s Adventity. When it was open

for the petitioner to deal with the specific averments, all that is stated is that there is a breach and violation. Nothing has been stated in the rejoinder with regard to the correspondence, copies of which are annexed to the reply affidavit. The rejoinder affidavit does not deal with the contents of the reply and specifically para 7(m) and 14 thereof. In such circumstances and when all the averments in the petition are hopelessly vague, that it is not possible to grant any relief to the petitioner. The respondents have not admitted that they are the employees of M/s Adventity. They have relied upon the documents and invoices evidencing, according to them, fees for consultation. Therefore, merely because there is some dispute on this issue, does not mean that the petitioner should be granted any relief. All such matters are at large before the Arbitral Tribunal which alone must deal with it.

22. When the petitioner has been unable to point out even prima facie as to what is the information which is available with the respondents and which is likely to be divulged to their competitors so also meet the clear case of the respondents of several persons having left the employment of the

petitioner, then, it is not possible to agree with Mr.Dada that on the lines of Delhi High Court an injunction against the respondents must follow. This decision is, therefore, distinquishable on facts. Which confidential information and trade secrets of the petitioner are being divulged by the respondents is not set out in the petition at all. The arguments of Mr.Dada and the relief in terms of prayer clause (C) is based upon the averments in para 5(iv) of the petition. The information that is stored on the computer/laptop is being referred and it is urged that the respondents have been contacting some of the clients of the petitioner whose names are mentioned in the said para. However, the arguments are canvassed with regard to only one company M/s Adventity. The respondents have given a categorical reply to this averment and have specifically pointed out that they have nothing in their possession. The averments in para 5 of the have been denied and the respondents have urged that there is no information which is stored in the laptops provided to them or is otherwise procured or retained by the respondents from the records of the petitioner to secure any benefit in any new competitive business. They have denied that they have retained any property of the

petitioner company. Infact they are ready and willing to return the laptops. With regard to paragraph 5(iii) and (iv) of the petition, the respondents have denied their contents in paragraph 42 and 43 of the affidavit in reply. They have denied that the respondents have deliberately and intentionally breached any obligations. They have denied that any request was made to return the laptops. In any event the laptops are made an issue but the petitioner has failed to point out whether the laptops contain any confidential information. Moreover, it is denied by the respondents that the laptops contain any confidential information and trade secrets.

23. Thus, for the reasons that the petitioner has failed to make out any prima facie case so also the petitioner failing to make out a case of balance of convenience being in its favour as well, no question of issuing any interim injunction or interim measures in terms of prayers in the petition arises in the facts and circumstances of the present case. There is no case made out of any irreparable injury in as much as if the arbitration proceedings commence and the petitioner is successful before the Arbitral Tribunal surely they

would get all such reliefs as are permissible in law. This is not a case where the differences and disputes going on for a period of time and eventually the respondents leaving the services or ceasing to be the part of the petitioner in June, 2007 that, today or presently, any interim measures need to be granted. The petitioner can compensate itself if the petitioner succeeds before the Arbitral Tribunal in proving its case.

23. In such circumstances, no case is made out for exercising the powers under section 9 of the Arbitration and Conciliation Act, 1996 at this prima facie stage. The Arbitration Petition is accordingly dismissed. Having taken such a view of ‘ the matter at this prima facie stage, I do not deem it necessary to make a detailed reference to other decisions cited by Mr.Tulzapurkar. However, it is clarified that all observations are tentative and prima facie and shall not influence the Arbitral Tribunal in deciding the matter on its own merits and in accordance with law. No order as to costs.

(S.C.DHARMADHIKARI J.)